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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

J.L. LESTER & SON, INC.

APPELLANT

V.

CAROLYN TEESE SMITH

ADMINISTRATRIX, ESTATE OF H.W. SMITH

APPELLEE

PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF GEORGIA

AND TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether under State Statute authorizing Summary Judgment 30 days after motion filed and served, requirements of federal due process and equal protection are met where court hears and enters judgment for movant on count filed only two days prior to hearing and to which there has been no Motion filed and no notice or opportunity for hearing given.
2. Whether where a State statute authorizes court to enter Summary Judgment on motion where all issues of fact have been eliminated it meets federal due process and equal protection for court to grant summary judgment because plaintiff failed to prove his allegations.
3. Whether State statutes and decisions defining and distinguishing a guarantor and surety may be applied to same factual situations and opposite results reached without violating federal due process and equal protection.
4. Whether security deed given by grantor to cover future debts of third person can be ordered cancelled by court when debts have not been paid without violating federal due process rights.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

J.L. LESTER & SON, INC.

Petitioner

V.

CAROLYN TEESE SMITH

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND TO THE COURT OF APPEALS OF GEORGIA

THE PETITIONER, J.L. LESTER & SON, INC. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia in this case of June 2, 1981 in which rehearing was denied on June 23, 1981 and the judgment of the Georgia Court of Appeals of May 3, 1982 in which rehearing was denied June 7, 1982 and in which the Supreme Court of Georgia denied the writ of certiorari on July 9th, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported in 162 Ga. App. 506 and

the report of decision by the Supreme Court of Georgia in a previous appearance of this case in that court is reported in 247 Ga 710. The decision of the trial court after the Supreme Court decision and before the Court of Appeals of Georgia decision is set out in the appendix hereto, as are the decisions of the Georgia Supreme Court and Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3rd, 1982, and a timely motion for rehearing in that court was denied on June 7, 1982, and the Supreme Court of Georgia denied petitioner's application for a writ of certiorari on July 9, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 27 U.S.C. Sect. 1257 (3).

QUESTIONS PRESENTED

1. Whether under a State Statute authorizing a trial court to enter Summary Judgment 30 days after motion therefor has been filed and served the requirements of federal due process and equal protection are met in a case where the

trial court hears and enters judgment for movant on a count which has been filed only two days prior to the hearing and to which count there has been no Motion for Summary Judgment filed and no notice or opportunity to prepare for the hearing has been given.

2. Whether in a case where a State statute authorizes the court to enter a Summary Judgment on motion where all issues of fact have been eliminated it meets the requirement of federal due process and equal protection for the court to grant a summary judgment because the plaintiff has failed to prove his allegations.

3. Whether State statutes and decisions defining and distinguishing a guarantor and a surety may be applied to the same factual situations and opposite results reached without violating federal due process and equal protection.

4. Whether a security deed given by the grantor clearly to cover future debts of a third person can be ordered cancelled by the court when these debts have not been paid?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF UNITED STATES

ARTICLE I, SECTION 10

LIMITATIONS OF POWERS OF INDIVIDUAL STATES

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

Article V. Constitution of the United States

Article XIV. Constitution of the United States

81A-156 (b). Georgia Code Annotated

A party against whom a claim, counter claim or cross-claim is asserted...may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceeding thereon The motion shall be served at least 30 days before the time fixed for the hearing The adverse party prior to the day of hear ing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined.

(f) When affidavits are unavailable Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition,

the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

67-1301, Georgia Code Annotated

Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said grantor any money or to secure any other debt....such conveyance of real or personal property shall pass the title of said property to the grantee until the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts to be an absolute conveyance...and not a mortgage.

103-101, Georgia Code Annotated

Suretyship-Definition; guaranty distinguished.--The contract of suretyship is one whereby a person obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, the principal remaining bound therefor. It differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor.

113-1525, Georgia Code Annotated

Duty (of Administrator) as to contracts of decedent. The administrator, as far as possible,.shall fulfill the exec-

utory and comply with the executed contracts of the decedent.....If, however the personal skill of the intestate entered into the consideration of the contract, his death renders the execution impossible, and the contract, though entire, shall be considered as divisible and closed at his death...

STATEMENT OF THE CASE

Petitioner and respondent's intestate entered into an executory contract whereby petitioner agreed to furnish merchandise to H.W. Smith and to a corporation which was in the process of being formed by Mr. Smith and his associates. The contract anticipated that the merchandise would be paid for on delivery, but recognized that for various reasons debts would be incurred in the ongoing relationship, and a security interest in the assets of the businesses was given to secure such debts.

The contract provided that " The persons signing this agreement for retailer shall be personally and individually bound to pay and liable for all indebtedness that may result on the part of retailer to wholesaler whether retailer is a partnership, corporation or proprietorship in addition to the liability of the retailer who may be operating as a corporation or partnership. The liability of the undersigned

signatories shall be primary, original, joint and several, and suit may be brought for collection of such indebtedness against any one or more of the parties liable."

The contract further provided that it was binding on " the representatives, succ essors and assigns of each of the parties thereto"

In connection with the transaction, Smith made and delivered to petitioner a deed to secure debt conveying 397.37 acres of land to secure payment of 3 certain notes described therein and also it included the following recitation "...and this deed will secure all indebtedness of Smith & Whitfield & also indebtedness of Bubba's of Tenn., Inc., a corporation now being formed."

The corporation's organization was completed and petitioner furnished merchandise to it which was not paid for.

H.W. Smith was murdered in July, 1979, at which time Bubba's of Tenn. Inc was indebted to petitioner on open account for merchandise delivered under the contract with Smith in an amount over $85,000.00.

Petitioner's officers learned of Smith's death, but were not directed to cease delivering merchandise to Bubba's by his administratrix, the respondent, and continued

to deliver merchandise to the corporation, of which Smith's administratrix became an officer and director.

Bubba's of Tenn., Inc. in the ensuing months, made payments to petitioner but the amount owing at the time of Smith's death by Bubba's never subsequently was reduced by these payments, but continued to increase.

Petitioner then began procedures to foreclose the security deed against the sums owed by Bubba's by exercise of the power of sale contained in the deed.

Respondent then filed an equitable complaint to enjoin the sale and after hearing, the trial court entered a temporary injunction preventing the foreclosure of the security deed by petitioner to collect any sums claimed due under the contract between petitioner and Smith to furnish merchandise to Bubba's as a result of any merchandise delivered to Bubba's after Smith's death; basing the action on its findings that (1) Smith signed the contract in his corporate capacity and thus was never liable individually (2) The contract was one of guaranty, and thus revoked by Smith's death, and (3) There was no indebtedness existing at the time of Smith's death.

Petitioner appealed the issuance of the temporary injunction to the Georgia Sup-

reme Court, which initially affirmed the trial court's judgment without opinion.

Petitioner filed its motion for rehearing in the Georgia Supreme Court and that court entered its decision in which it held:

1- The contract between petitioner & Smith fixed the terms and conditions upon which purchases were to be made by the wholesaler to the retailer. It was an offer for formation of a number of contracts from time to time, citing Buick Motor Co. v. Thompson, 138 Ga 282

2- Smith cannot be liable for those contracts made after his death pursuant to the standing offer made in the contract because "to constitute a valid contract, there must be parties able to contract" and whether Smith was offeror or offeree, An offeree's power of acceptance is terminated when the offeree or offeror dies"

3- While Smith's estate would have been liable for payment upon any contracts entered into prior to his death, his estate is not liable for payment upon contracts made pursuant to the contracts after his death

4- The trial court court did not err in enjoining the foreclosure sale to satisfy open account indebtedness incurred subsequently to Smith's death.

As a result of petitioner's second motion for rehearing, the Supreme Court held: "On motion for rehearing, the wholesaler contends that this latter finding of the trial court (that there existed no outstanding open account indebtedness on the date of Smith's death) was erroneous. This issue is one which can only be resolved at a trial on the merits and the trial court did not abuse its discretion in granting the interlocutory injunction in order to preserve the status quo until that issue could be decided upon the final trial of the case, citing:

Parker vs. Amer Family etc 229 Ga 633

which held that where an issue of fact was involved it is one "which can only be resolved by a jury" and the trial court was authorized to grant an interlocutory injunction in order to preserve the status quo.

Respondent had filed a motion for summary judgment in the trial court while the case was pending in the Supreme Court, & filed an amendment to the motion on the 11th day of June, 1981, 18 days before the remittitur was filed in the trial court.

On July 6, 1981, respondent filed a "Notice of Motion" signed only by counsel for movant which showed service by mail on July 1, 1981 and which was received by

petitioner's counsel on July 9th. It was not filed in court until July 6, 1981.

On June 30, 1981, petitioner filed an amendment to his counterclaim against respondent in which additional counts adding a cause of action for fraud and misrepresentation were set outand new factual allegations added to the defenses.

The "Notice of Motion" received by petitioner's counsel on July 9th stated that respondent would call the motion for summary judgment up before the court on July 15th for hearing and no order of court was included that petitioner appear.

On July 14th, petitioner filed his verified RESPONSE to the Motion for Summary Judgment, claiming improper and inadequate notice and service of the hearing, and claiming that he was entitled to 30 days notice of the hearing. In the affidavit filed with the RESPONSE petitioner also showed that it was entitled to service of an order or rule of court setting the hearing rather than a Notice of Motion signed by counsel for movant, and that there were matters of evidentiary defense to the Motion that could not be presented by affidavit and could not be presented within the time afforded by respondent's Notice of Motion.

The court, on July 15th, overruled the

petitioner's RESPONSE, and denied additional time for petitioner to prepare for the hearing, heard the motion, and entered an order sustaining the motion for summary judgment on October 7, 1981.

At no time did respondent file a Motion for Summary Judgment as to the fraud count of the counterclaim, and no additional affidavits or other evidence in support of the Motion for Summary Judgment was filed from the time of the Supreme Court judgment until the judgment of the trial court on October 7, 1981.

In spite of the absence of a motion for summary judgment as to the fraud count the trial court granted summary judgment as to that count, as well as the original count sounding in contract.

In spite of the absence of any evidence by affidavit or otherwise relating to the issue of fraud, the trial court sustained the motion for summary judgment on the basis that " the depositions and evidence fail to support allegations of fraud in the amended Counterclaim and any such cause of action is hereby dismissed", and " There is no evidence of a contrary intention in this case (but that Smith signed the operating agreements as a guarantor)."

The decisional law of Georgia as to the power of the court to grant summary judg-

ments at the time was settled and clear as set out in the case of:

Lansky v. Goldstein, 136 Ga App 607

" On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party and all doubts are resolved against the movant. The movant has that burden even as to issues upon which the opposing party would have the trial burden and the moving party's papers are carefully scrutinized, while the opposing party's papers, if any, are treated with considerable indulgence."

In granting summary judgment in favor of respondent, the trial court by supplemental order decreed that upon payment of the amounts due as attorney's fees on the note indebtedness of H.W. Smith and Bubba's of Tenn.Inc., the security deed given by H.W. Smith to secure all debts of Bubba's must be cancelled and surrendered by petitioner.

Since the statutory and decisional law of Georgia relating to the distinction between suretys and guarantors was apparently clear and settled as to a surety's obligations surviving his death while a guarantor's did not and that Smith's contract with petitioner clearly made him a surety; and since the security deed statutes and decisions relating thereto clearly provid-

ed that such deeds may be accepted as security for future debts of a third person, and foreclosed for payment of such debts; petitioner did not anticipate that the Georgia Supreme Court would violate the petitioner's federal due process and equal protection rights by applying a different and individual set of legal principles to him; and thus did not raise the issue of such violations until they had occurred in the Georgia Supreme Court, but did raise these issues of violation of his federal constitutional rights in its motion for rehearing in the Supreme Court.

In withdrawing its original decision & opinion and in altering its second decision and opinion, the Georgia Supreme Court necessarily considered and decided against petitioner's contentions of violations of his federal constitutional rights.

After remand to the trial court and before the decision of the Georgia Court of Appeals affirming the grant of respondent's motion for summary judgment against petitioner, the statutes and decisions of Georgia relating to the consideration and grant of summary judgments in the absence of a motion therefor and without reasonable notice and opportunity to prepare for a hearing clearly required a judgment reversing the entry of summary judgment against pet-

itioner; and petitioner did not anticipate that the Court of Appeals would apply a set of different principles of law to the same set of controlling facts in petitioner's case and affirm a clearly erroneous eous decision; and thus did not raise an issue of violation of its federal constitutional rights to due process, equal protection and no retroactive impairment of the obligation of contracts until it did so in its petition for certiorari to the Georgia Supreme Court in this case.

In denying the petition for certiorari, the Georgia Supreme Court necessarily considered and denied petitioner's contentions that his federal constitutional right was violated.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Georgia of June 3, 1981, is clearly in violation of petitioner's right to due process of law and equal protectinn of the laws of Georgia in that it was inconsistent with that state statute defining contracts of surety and guaranty which controls other contracts and categorized the surety contract in this case as one of guaranty. The contract here involved is one in which respondent's decedent obligated himself to pay the debt of a corpor-

ation he was in the process of forming in consideration of credit given to the corporation, and there was no consideration or benefit flowing to Smith thereunder.

The Supreme Court of Georgia held in the case of: Allen v. Confederate Publishing Co., 121 Ga 773, that under a contract made during the lifetime of Allen which provided that Allen would pay for books to be published and delivered to Allen in accordance with the terms of the contract as follows: " Even if the contract is treated as unilateral, it was binding upon J.H. Allen during his lifetime, and his legal representatives after his death, until there was a withdrawal communicated to the other party before its promise was executed in whole or in part."

The court went on to say in that decision: " Allen did not attempt to withdraw during his lifetime, and his executor made no effort to withdraw until after the books were published and offered to him in compliance with the undertaking of the plaintiff. The death of J.H. Allen did not terminate the contract. A mere notice to the plaintiff that Allen had died would not amount to a withdrawal on the part of the executor, even if he was at liberty to with draw at the time this notice was given."

The Supreme Court, in its opinion, based it on the case of Buick Motor Co. v. Thompson, 138 Ga 282, but even that case was authority for reversal of the trial court rather than affirmance since it held, @ 286 " An offer to sell on certain terms without consideration therefor, is unilateral, and may be withdrawn before acceptance. After acceptance while still open and an agreement to buy, it ceases to be unilateral and becomes bilateral and binding..If the offer is...generally to furnish upon order, then the giving of an order for a certain thing or amount included in the offer, before its withdrawal or termination makes a definite and fixed tract as to the thing or things so ordered."

The Supreme Court decision was also in violation of the state statute which controls others who have contracted with persons who die thereafter, and which says, " Duty (of administrator) as to contract of decedent.-- The administrator, as far as possible, shall fulfill the executory and comply with the executed contracts of the decedent...." See 113 Ga Code Ann 1525.

In addition, even in contracts of guaranty in Georgia, under the authority cited by the trial court, the death of the guarantor does not nullify the obligation of the contract as to transactions after the

death of the guarantor if the contract of guaranty itself expresses a contrary intention. See Sulter v. Citizens Bank & Trust Co., 51 Ga App 798. And also see fact that contract involved her specifically bound Smith's administrators.

In holding Smith's administratrix was not liable to petitioner for goods furnished his corporation after his death and before petitioner was notified the offer was withdrawn, the Georgia courts clearly violated petitioner's rights to due process of law and equal protection of the laws and this justifies the grant of the writ of certiorari by this Court.

2. The decision of the Georgia Supreme Court holding that the security deed given by Smith in his lifetime to secure payment of his corporation's debts could not be foreclosed to collect for goods furnished the corporation after Smith's death impaired the obligation of the petitioner's contract with Smith retroactively, and was contrary to Article I, Section 10 of the United States Constitution.

The applicable state statute, Ga. Code Ann. 67-1301, provides that a security deed passes title to the property to the grantee until the debt or debts which said conveyance was made to secure

have been fully paid.

In the security deed involved here, it recited that it was given to secure certain specified notes and all other obligations of H.W. Smith and Bubba's of Tenn., Inc. " a corporation now being formed", which clearled referred to future debts of said corporation because it was not even in existence when the deed was given.

A case in the federal court system first spelled out that a deed to secure debt in Georgia may be given to secure the debt of a third person. See In Re American Ventures, Inc., 340 Fed Supp 279. In addition, the Georgia appellate courts had clearly held a security deed can be made and enforced to secure payment for certain goods and supplies to be furnished by the plaintiff to the defendants in the future. See Barnes v. Downing Company, 154 Ga. 363.

Therefore, in holding that the security deed sought to be foreclosed by petitioner did not cover the debt of Bubba's Inc of Tenn. for goods furnished by petitioner after Smith's death, the Georgia Supreme Court clearly violated petitioner's right to equal protection of the state's laws as applied to others, and such holding impaired retroactively the obligation of Smith's contract with petit-

ioner. This ruling, we submit, justifies the issuance of the writ of certiorari to review the judgment below.

3. Petitioner was denied due proc- procedurally in the state court's actions in granting summary judgment as to a count in the absence of a motion for summary judgment. This is clearly error under the federal interpretation of procedure, see- New & Used Auto Sales v. Hansen 245 Fed 2d 951, which has been approved by the Georgia appellate courts in Cruce v. Randall, 245 Ga 669, except in cases where such filing would be a pure formality and the Georgia court has cited with approval 6 Moore's Federal Practice, 56-331, 334, and 56.12 " Care should, of course, be taken by the trial court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law."

In the case before the court, the Court of Appeals of Georgia sustained a grant of summary judgment in this case in the absence of the notice provided by law and where petitioner had complied with the provisions of law to secure additional time

and where no motion for summary judgment as to that count had been filed, and in which the trial court did not find that there was no genuine issue of fact, but found instead that petitioner had not come forward with evidence to prove the allegations of fraud set out in his complaint to which there did not even exist a denial in the pleadings of movant.

4. Petitioner's treatment in this case at the hands of the state court system from the trial level to the Supreme Court of Georgia is so basically unfair and inconsistent with law and petitioner's federal constitutional rights; and the decisions sought to be reviewed have injected so many conflicting principles into the law of Georgia that unless reviewed and corrected, many other citizens of the United States living in Georgia will be equally deprived of their federal constitutional rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Georgia Court of Appeals and the prior judgment of the Georgia Supreme Court as set out in this petition.

Respectfully submitted,

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September 30, 1982.

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63513. J.L. LESTER & SONS, INC. v. SMITH, ADMX. (Bi-39)

BIRDSONG, Judge.

Open Account Indebtedness. J.L. Lester is a wholesale grocer doing business in Georgia. Prior to 1979, Lester furnished groceries to several stores operating under the name of Yelloe Jacket stores owned and operated by H.W. Smith. Lester operated essentially a cash-and-carry business, but because payment by checks sometime were delayed, or for other reasons, Lester by force of circumstances in effect extended credit pending payment. Nevertheless, the obvious intent of the purchasers and seller of the wholesale groceries was that credit was not extended and all sales were for cash. Also prior to June, 1979, Lester sold groceries to Ernest L. Whitfield. Both Smith and Whitfield had established good business relations with Lester, paying their bills promptly and fully. In June, 1979, a grocer in Chattanooga, Tennessee died apparently possessed of three grocery stores. After death of the owner, the stores were allowed to deteriorate both in grocery stock and building and fixtures. Smith and Whitfield negotiated with the

widow, Mrs. Lasater, for the purchaser of two of the stores. Smith approached Lester to restock the two stores in Chattanooga which Lester agreed to do. Smith and Whitfield signed promissory notes as president and secretary of a new corporation, Bubba's of Tennessee, to pay for the groceries furnished by Lester to restock the two stores. Smith and Whitfield then arranged to purchase the third store in Kimball, Tennessee, a suburb of Chattanooga. Lester also agreed to restock this store. A third note was prepared to cover the cost of this purchase. The first two notes were re-signed by Smith and Whitfield along with the third note and Smith pledged by security deed almost 400 acres of land lying in Walton County as additional security for the purchase of groceries for all three of the stores. This last signing occurred in lateJune, 1979. Smith and Whitfield also signed in their individual capacities as guarantors of all three notes. A month later in late July, 1979, Smith was murdered in one of his other stores in Georgia.

Lester's business practice was to ship groceries to each store and then present the purchaser with a summary sheet showing the purchased groceries and the amount owing. As payments were made, the payment was applied to the oldest purchase. Payments were made throughout June, July and later months on the basis of these summary sheets. Even after Smith's death, Lester continued to furnish groceries to Bubba's of Tennessee until Whitfield informed Lester that future purchases of groceries would be made from another wholesaler. At this time, counting the three notes that had become due as well as the open account indebtedness, Bubba's was indebted to Lester in excess of $205,000. Lester made demand for payment of the entire indebtedness upon Smith's estate and then commenced advertising for foreclosure of the 400 acres in Walton County. In order to protect the land, Mrs. Smith acting on behalf of Smith's estate, paid all the first two notes guaranteed by Smith. When Lester recommenced advertising and foreclosure proceedings against the land to recover the open account indebtedness in addition to the third note (the Kimball store note

which ultimately was paid into the registry by order of the court), Mrs. Smith sought a restraining order followed by an interlocutory injunction to forestall the foreclosure pending the determination of the validity of the estate's obligation for the open account indebtedness and the validity of the security deed. Lester answered and filed a counterclaim seeking payment of the open account as well as the third note and attorney fees. The trial court granted the temporary injunction, whereupon appellant Lester filed an appeal to the Supreme Court. While the appeal was pending in the Supreme Court, Lester amended its counterclaim to complain that Smith and Whitfield together with Mrs. Lasater conspired in Georgia (with Smith and Whitfield acting as agents for Mrs. Lasater) to defraud Lester. The trial court was affirmed in its grant of an injunction by the Supreme Court. J.L. Lester & Son v. Smith, 247 Ga. 710 (280 SE2d 732). Upon remand, the trial court granted summary judgment to Mrs. Smith as administratrix on her complaint for an injunction, found that the estate was not liable for any indebtedness to Bubba's of Tennessee because it was incurred after

Smith's death; found that all three notes had been satisfied and directed the last note (involving the Kimball store) be marked satisfied and returned to the estate; directed the security deed which also had been paid in full to be marked satisfied and returned to the estate; concluded that the estate was not liable for debts owed by the Yellow Jacket stores; concluded that there was no evidence of fraud so as to warrant the interpleader of Mrs. Lasater in the Georgia suit; concluded that there was no jurisdiction under the long arm statute to exercise jurisdiction over Mrs. Lasater; and lastly, granted summary judgment to Mrs. Smith as to Lester's cross complaint. Lester brings this appeal enumerating as error each of those rulings. Held:

1. In its first enumeration of error, Lester urges that the trial court erred in granting summary judgment to Mrs. Smith on the main (her) complaint. This enumeration is supported by several interrelated arguments. Lester first argues that it was not afforded the requisite 30 days in which to prepare its defense to the motion for summary judgment nor given adequate

time to file its defenses thereto. In fact, however, the record shows that Mrs. Smith filed her motions for summary judgment on the main complaint and Lester's original cross complaint on November 26, 1980. An amended motion for summary judgment was filed by Mrs. Smith on June 11, 1981. The notice of the hearing date on the motion was filed on July 6, 1981, for a hearing date of July 15. The hearing on the motions was held on July 15, 1981. The ruling on the motion was not rendered until September 29, 1981, during which time both parties were at liberty to file additional briefs in support of their respective positions. The supplemental order by the trial court dealing with the Yellow Jacket indebtedness was rendered on November 6, 1981.

It is obvious from the above chronology that 34 days elapsed from the filing of the amended motion for summary judgment until the hearing thereon and the order relating thereto was not entered and filed until 75 days after the filing (see CPA § 5 (d) (Code Ann. § 81A-155 (d)). In effect, appellant argues that it should have had 30 days notice of the hearing from the

trial court as oppsed to notice from counsel, and that the trial court erred in denying it further time in which to prepare its defensive pleadings. We reject this facet of the appellant's arguement and find a satisfactory compliance with the mandates of the Civil Practice Act.

Appellant also argues that the debtor Smith signed the three notes and security deed as a surety and not as a guarantor. As a surety, Lester argues that the debt survived Smith's death and bound his estate. Secondly, Lester argues that there are questions of fact as to whether the indebtedness or part of it existed at the time of Smith's death and if so, whether the subsequent payments extinguished the existing debts so as to relieve the estate from further obligation.

It is not disputed the three promissory notes signed by Smith have been fully satisfied by the estate as well as all accrued interest and that attorney fees have been paid into the registry of the court. Thus, the only bone of contention is the open account indebtedness. In its original order granting the temporary

injunction precluding Lester from proceeding with its foreclosure action on the Walton property, the trial court found as a fact that the estate would not be liable for any open account indebtedness incurred after Smith's death inasmuch as Smith agreed as an individual to be responsible for each new purchase as it was incurred. This logically followed the factual conclusion that the intent of the parties was to extend no credit but to require payment as soon as reasonably possible after the delivery of groceries to Bubba's of Tennessee. Smith thus contingently agreed to pay for such groceries only when and if they were ordered and delivered. This continuing promise was extinguished by his death. In its opinion in Lester vs. Smith, 247 Ga. 710 at p. 712, the Supreme Court held: "Assuming that Smith was personally liable as a signatory and party to the 'operational statement' by virtue of the manner in which it was executed, or that in any event he was personally liable for indebtedness incurred under the 'statement' pursuant to Part II, par. 2, we nevertheless agree with the trial court that neither Smith nor his

estate was liable for the open account indebtedness which was incurred after his death with notice thereof to the wholesaler."

As to whether any of the original indebtedness incurred before Smith's death still exists, the only evidence we have been able to find in the record shows that the three promissory notes were to cover the costs of groceries delivered to the three Tennessee stores up to the face value of the notes. The continuing purchases exceeding the face value of each note were to be satisfied out of income generated by the respective store to which groceries were delivered. The records available to the trial court showed that the continuing payments were made to the oldest indebtedness. Thus, the records show that the amount of the notes plus payments made from store income when applied to statements for groceries delivered to the three stores were sufficient to extinguish all indebtedness existing prior to Smith's death. This was the contention of Mrs. Smith before the trial court and we note that Lester does not seriously contend that the cost

of groceries delivered prior to July 25, 1979 (the date of Smith's death) has not been satisfied. Lester makes the brunt of its argument to the point that Smith was a surety and the estate is liable for the entire open account indebtedness. However, the opinion of the Supreme Court resolves that contention adversely to Lester's interest for it is now the law of the case that Smith's estate is not liable for post-death indebtedness.

Related to this argument is Lester's contention that the trial court erred in ordering the return of the Kimball note and the security deed marked satisfied. Lester naturally objects to relinquishing collateral which it contends supports the open account indebtedness. As we have earlier concluded, there is no contention that all three notes have not been paid by the estate, including all interest and attorney fees. The Supreme Court has affirmed the trial court's conclusion that Smith's estate is not liable for post-death indebtedness. Thus, the trial court correctly concluded the Kimball note should be marked satisfied and returned to the

estate. Because the security note was determined to cover the three notes and not the post-death indebtedness, it too properly was ordered to be marked satisfied and returned to the estate. We find no merit in enumerations 1, 5, or 6.

2. Enumerations 2, 3, and 4 also are related to each other. After the Supreme Court had affirmed the grant of Mrs. Smith's motion for injunction against foreclosure, Lester amended its counterclaim to reflect that Smith and Whitfield conspired with Mrs. Lasater to defraud it by withholding important information concerning the operation of the stores and the financial arrangements between Mrs. Lasater and Bubba's of Tennessee. In enumerations 2, 3, and 4, Lester argues that the trial court erred in finding no evidence of fraud in the contractual negotiations between itself and Smith and Whitfield. This finding of absence of fraud resulted in the grant of summary judgment to Mrs. Smith as to the counterclaim and the denial of Lester's motion to join Mrs. Lasater under the provisions of the long arm statute.

Pretermitting any error by the trial court in concluding that there was not evidence of fraud, we find this portion of the trial court's order to have been mooted by the conclusion that Smith's estate is not liable for the open account indebtedness. Assuming a conspiracy and fraudulent activities by Mrs. Lasater, Smith and Whitfield, such a conspiracy would only have affected the validity of the three promissory notes and the open account. We have concluded already that the notes have all been satisfactorily paid and Smith's estate has no obligation for the open account. A judgment right for any reason normally will be affirmed. Argonaut Ins. Co. v. Cline, 138 Ga. App. 778, 782 (4) (227 SE2d 405). Smith has lived up to all his promises and left Lester as financially sound as the law requires. It is an old and sound rule that error, to be reversible, must be harmful. First Nat. Bank v. American Sugar Refining Co., 120 Ga. 717 (48 SE 326); Burger Chef Systems v. Newton, 126 Ga. App. 636, 639 (191 SE2d 479). Moreover, we find ample support for the trial

court's conclusion that there is no evidence that either Smith or Whitfield ever held themselves out to be agents for Mrs. Lasater If there were fraudulent activities, they occurred in Tennessee and whatever was said in north Georgia to Lester by Smith and Whitfield was in relation to Bubba's of Tennessee and did not relate to Mrs. Lasater. The trial court did not err in concluding that the long arm statute did not reach Mrs. Lasater where there is no evidence that there were contacts in this state by her or on her behalf.

3. In its last enumeration of error, Lester argues that the trial court erred in concluding the Smith estate was not liable for indebtedness owing to Lester by the Yellow Jacket stores. It is not disputed that Smith was the sole proprietor of those stores and that indebtedness was incurred on the behalf of the Yellow Jacket markets. However, it is equally clear that Smith signed the agreement with Lester as an officer of that corporation. There simply was no credible evidence or justification for concluding that Smith became individually liable for the Yellow Jacket

debts. In the absence of an individual indebtedness, there was no continuing liability imposed upon Smith's estate. The trial court did not err in its supplemental order relieving the estate and Mrs. Smith as administratrix thereof of any obligation relating to those debts.

Judgment affirmed. McMurray, P. J., and Banke, J., concur.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

JUL 9 1982

Atlanta

Case No. 38907. J. L. Lester & Son, Inc. v. Smith, Admrx.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

Order, Polk County Superior Court of Sept 29, 1981

IN THE SUPERIOR COURT FOR THE COUNTY OF POLK, STATE OF GEORGIA

SMITH VS. LESTER # 11,502

---- order -------

The above captioned case having come before this Court on Both Parties Motions For Summary Judgment and subsequent Amended Answer and Counter-Claim seeking to add a non-resident third party; after hearing oral argument, reviewing the briefs submitted by the parties, depositions, documents admitted into evidence, the pleadings, and other pertinent parts of the record, the Court makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff is the duly appointed Administratrix of the estate of H.W. Smith, deceased, of Walton County, Georgia. Immediately prior to his death, Smith & Ernest L. Whitfield formed Bubba's of Tenn., Inc., A Tennessee Corporation, through which they planned to operate two retail grocery operations in the Chattanooga area and one in Kimball, Tenn., all under the name of Food Giant.

2. Smith, Whitfield, and Alfred Hewatt negotiated with Mrs. Lasater, a widow of a retail grocer in Chattanooga, to purchase his super markets and sought an extension of credit to stock these markets from Defendant, J.L. Lester & Son, Inc.

3. Defendant, Lester, is in the wholesale grocery business and, had previously done business with Smith and Whitfield at other stores operated by them independently in Georgia and completely unrelated to the case at issue.

4. Defendant agreed to stock all three stores in return for promissory notes by Smith and Whitfield to cover said inventory advances. Lester also agreed to furnish additional inventory under "operating agreements" on a cash or open account basis.

5. In addition to said notes, a Deed to Secure Debt with Power of Sale, dated June 1, 1979, was executed by Smith and delivered to Defendant with regard to approximately 397 acres of real property located in Walton County, Georgia.

6. Smith died intestate on July 25, 1979 Defendant had notice of Smith's death. Plaintiff was appointed Administratrix of Smith's estate 13 September 1979. Plaintiff at that time nor any time after,

neither sanctioned nor ratified on behalf of the H.W. Smith estate any indebtedness incurred on behalf of Bubba's and/or Whitfield with respect to the grocery store operations.

7. Until Smith's death Bubba's had been making payments for inventory supplies on an open account basis as they became due. It was a custom of Lester to apply payments to the oldest invoices and all unpaid invoices at the time of Smith's death were subsequently paid by Bubba's in the course of normal business.

8. In February and March 1980, all three of Plaintiff's notes came due, Defendant made demand upon Plaintiff for repayment of said notes as well as indebtedness incurred by Bubba's since Smith's death. Foreclosure ads were placed in The Walton County Tribune for the foreclosure of the Security Deed.

9. On March 19, 1980, a notice to enforce collection of attorney's fees was served on Bubba's of Tenn., Inc.

10. Plaintiff paid off 2 notes with all accrued interest, in return, Defendant agreed not to recommence foreclosure

foreclosure proceedings until July of 1980.

11. Defendant again commenced advertising in The Walton County Tribune during the month of July, 1980, for foreclosure upon property described in the Security Deed.

12. Plaintiff sought and received an injunction against the Defendant from foreclosing on the Security Deed. This Court temporarily restrained Defendant from foreclosing upon the Security Deed. As a condition to the Temporary Restraining Order, this Court required Plaintiff to tender into the Registry of the Court the sum of $56,070.82, which represented the principal and interest on the third note. This amount, plus additional interest and advertising costs were paid to Defendant.

13. On July 23, 1980, Bubba's was declared a debtor under Chapter 11 of the Bankruptcy Code by the U.S. Bankruptcy Court and its Business activities were placed in control of a Court appointed Trustee.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes as a matter of law the following:

While the Security Deed in question

was not executed in the manner one would normally expect due to various negotiatins and mailings from Rockmart to Walton County, the intent of the parties is clear and the deed was finally executed, delivered and recorded. This Court finds nothing improper which would render the Security Deed invalid.

As to the liability of the Smith estate for open account indebtedness this Court ruled Smith signed all three contracts in his corporate capacity, not as an individual. However, this is immaterial, " Smith cannot be held liable for those contract- made after his death pursuant to the standing offer in the "operating statements'..."J.L. Lester & Son, Inc. v. Smith, 247 Ga 710 (1981) at 712. The death of a guarantor (Smith) with notice to the guarantee (Lester) revokes the guaranty as to future transactions unless the guaranty itself expresses a contrary intention. Sulter v. Citizens Bank & Trust Co., 51 Ga App 798 (1935). There is no evidence of a contrary intention in this case.

Another issue in dispute is whether there remains any open account indebtedness incurred prior to Smith's death.

As a general rule, the oldest lien and oldest item in account will be paid first, the reason being that this is the usual intention of the parties. Smith v. Dalton Ice Co., 45 Ga App 447 (1932). This has been the practice of dealing between the parties, Ga. Code Ann. Sect 109A-1-205. When we receive a payment, we reflect that payment on the oldest unpaid invoice." (Lester Depo. pg. 10 line 15).

Lester had made a Motion to add Mrs. Geraldine Lasater, individually or as executor of the estate of Harold Lasater. As held in Atlas Aviation Inc. v. Hungate, 153 Ga App 517, 265 S.E. 2d 851 (1980), jurisdiction over a non-resident exists on the basis of transactive business in the State of Georgia if the non-resident has purposefully done some act or consummated some business in this state, or is connected with such act or transaction, & if such act or transaction does not offend the traditional forms of fairness and justice. In this instance, all negotiations relating to the sale of the stores to Smith Whitfield and Hewatt were conducted in the State of Tennessee. The contracts for sale were to be interpreted under the laws of the State of Tennessee. No evidence has been submitted that Smith or Whitfield ever

held themselves out to be agents of Mrs. Lasater or that Lester ever thought they were Mrs. Lasater's agents. There is no evidence nor is there even any allegations in the Amended Counter-Claim that Mrs. Lasater had any contacts with the State of Georgia either contractual or tortious.

As to the issue of whether the Defendant is entitled to attorney's fees under Ga. Code Ann. Sec. 20-506. Obligations to pay attorney's fees contained in Security Deeds and Bills of Sale to Secure debt are subject to certain provisions.

The note must provide for payment of attorney's fees in a specific percentage. The holder shall then notify in writing the party sought to be held on said obligation, that the attorney fee obligation will be enforced. The party sought to be held shall then have ten days to pay the principal and interest without incurring attorney's fees. In the present case the deed to Secure debt provided for fiteeen percent (15%) attorney's fees, if the debt wasn't paid when due to cover expense of a foreclosure proceeding. The letter sent by the Defendant's attorney was adequate and proper notice to Plain-

tiff of intent to enforce the attorney fee clause.

The amended defensive pleadings and Counter -Claim arose out of the same conduct, transactions and occurrences set forth in the original pleading, and therefore, relate back to the date of the original pleadings, Ga. Code Ann. Sec. 81A-115 (c). The depositions and evidence fail to support any allegations of fraud.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Smith estate cannot be held liable for any indebtedness incurred by Bubba's of Tennessee, Inc., subsequent to Smith's death.

IT IS FURTHER ORDERED, that the payments made by Bubba's of Tenn., Inc. were applied to the oldest debts as was the business practice of the parties involved and there was no open account indebtedness at the time of Smith's death.

This Court declines to allow Mrs. Lasater to be added as a party to this case as the requisite minimum contacts with the State of Georgia under its Long Arm Statute are lacking. The depositions, documentary evidence and pleadings taken as a whole fail to disclose any facts to support allegations of fraud in the amended Counter-Claim and any such cause of act-

ion is hereby dismissed.

IT IS FURTHER ORDERED, that is entitled to attorney's fees as called for in the Security instrument and Defendant is awarded Judgment for said attorney's fees in the amount of fifteen (15%) of the principal indebtedness and accrued interest from the time it became due until paid into the registry of the Court.

SO ORDERED, this 29th day of Sept. 1981.

s/ ARTHUR W. FUDGER
JUDGE, POLK SUPERIOR COURT.

POLK SUPERIOR COURT

SMITH VS. LESTER # 11,502

----- SUPPLEMENTAL ORDER ----

The above captioned case came before this Court on Both Parties Motions for Summary Judgment and subsequence Amended Answers and Counter-Claim seeking to add a non-resident third party. After hearing oral argument, reviewing the briefs submitted by the parties, depositions, documents admitted in evidence, the pleadings, and other pertinent parts of the record, the Court made findings of fact and conclusions of law which were contained in its Order entered September 29, 1981. The Court now

finds it necessary to supplement its September 29 Order in certain particulars. To that end, the Court makes additional findings of fact and conclusions of law as follows:

FINDINGS OF FACT

A corporate charter was granted by the Secretary of State of Georgia to Yellow Jacket Markets, Inc, on July 30, 1976.

CONCLUSIONS OF LAW

Based upon all findings of fact herein and in the September 29 order, the Court further concludes as a matter of law the following.

Since Yellow Jacket Markets, Inc. as a corporation, was the primary obligor of its own liabilities and since there is no evidence before the Court that Smith personally guaranteed the payment of any corporate liabilities of Yellow Jacket, the Smith estate cannot now be held liable for such debts. Defendants produced no documents in response to plaintiff's request to produce which would support such a personal obligation of Smith with respect to the Yellow Jacket open account indebtedness. Both Jimmy Lester and Marson Dunaway, Lester's attorney, conceded that defendant had found no such document to that effect (Lester Dep. pgs. 25-26).Fur-

thermore, there are not even any invoices as to the underlying indebtedness attached to any of defendant's pleadings.

The only indebtedness for which Smith was liable under the Security Deed was the indebtedness for which he was or would become personally liable and not in conjunction with the debts of others. Since the principal and all accrued interest of the three notes referenced in the Security Deed have already been paid in full (except for attorneys fees) and since the Court has previously held that the Smith estate cannot be held liable for any additional indebtedness incurred by Bubba's of Tennessee, Inc., subsequent to Smith's death and there was no open account indebtedness at the time of Smith's death for which his estate would now be liable, all indebtedness covered by the Security Deed has been paid, except attorneys fees arising under the three notes. The third and final note which plaintiff has paid, upon her payment to defendant of attorney's fees in accordance with the Court's September 29 Order, should be returned to plaintiff. Upon payment of the attorneys fees under the three notes, the Security Deed should also be returned to plaintiff in recordable form and marked "satisfied"

so as to permit plaintiff to have it satisfied of record by the Clerk of Superior Court of Walton County, Georgia. Defendant's entitlement to attorneys fees under the Security Deed is limited to such as is due under the three notes.

Defendant has argued that plaintiff's verification of her original Complaint was insufficient as a matter of law. The Court disagrees. Irrespective of whether or not defendant's complaint regarding the issue of improper verification was timely (and it probably was not), the Court feels that the plaintiff nonetheless satisfied all the obligations required of her under the provisions of Ga. Code Ann. §81-110 which states that "(P)etitions for a restraining order, injunction, receiver, or other extraordinary equitable relief shall be verified positively by the petitioner or supported by other satisfactory proofs". (emphasis added). The Court believes that in exercising its discretion as to whether or not to enter a temporary restraining order as requested by plaintiff in August, 1980, or later, a temporary injunction, it is permitted to consider a positive verification, "other satisfactory proofs" or, presumably, both. The Court

believes the the only person who could have given "positive verification" of the Complaint in behalf of plaintiff was Smith himself, and he was dead. Therefore, irrespective of whether or not the Complaint was "positively verified" at the time it was filed, this Court believes that "other satisfactory proofs" as contemplated by the Code section in the form of the depositions of James L. Lester and Marson G. Dunaway, Jr., as well as the record and documents considered by this Court by agreement of the parties at the October 7, 1980, hearing on the temporary restraining order, were considered by the Court prior to the entry of its October 13 Order pertaining to this matter, including the granting of the temporary injunction. If a deficiency did exist on the date the restraining order was entered on August 4, 1980, it was rectified at the time of the hearing on the temporary injunction on October 7, 1980, by the "additional proofs" as described above. This Court is permitted to do so, since defects, if existing, are amendable, Mulcay v. Augusta Fire Department Credit Union, 220 Ga. 805, 807 (1965). Also see Rice & Saxe v. Dodd & Co., 94 Ga. 414 (1894); Bracewell v. Cook, 192 Ga.

678 (1941); Kilgore v. Paschall, 202 Ga. 416 (1947). The verification was sufficient and is hereby sustained.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that upon payment of attorneys fees as set-forth herein that defendant return to plaintiff the original Kimball note in favor of defendant, dated June 27, 1979, for which the Smith estate has paid defendant the sum of $56,494.84.

The judgment contained in the September 29 Order in favor of defendant for attorneys fees in the amount of 15% of the principal indebtedness referred solely to the three notes which were paid by plaintiff to defendant, and the 15% should be applied to the principal amount of those notes and all accrued interest which was paid thereunder by the Smith estate. The Court calculates that the paid total principal and accrued interest on all these notes to which the 15% would apply is $123,011.57 or, thereby, attorneys fees totalling $18,451.00.

IT IS FURTHER ORDERED that upon payment of the attorneys fees regarding to three notes described above that defendant return to plaintiff the Security Deed in recordable form and marked "satisfied" in the manner

prescribed on the back of the Security Deed in recordable form and marked "satisfied" in the manner prescribed on the back of the Security Deed, since all indebtedness secured thereby will have been paid in full.

IT IS FURTHER ORDERED that the Smith estate has no liability to defendant with respect to any indebtedness allegedly owed to defendant by Yellow Jacket Markets, Inc.

The Order of this Court, entered September 29, 1981, with respect to this matter is reaffirmed herein in its entirety and that Order, along with this Supplemental Order, should be considered together with respect to the disposition of Civil Action File No. 11,502 herein.

SO ORDERED this 5th day of November, 1981.

/s/ Arthur W. Fudger
Arthur W. Fudger
Judge, Polk Superior Court

IN THE SUPERIOR COURT FOR THE COUNTY OF POLK, STATE OF GEORGIA
SMITH VS. LESTER #11,502

ORDER

The above styled case is before the Court on Defendant's Motion for Summary

Summary Judgment. After a consideration of the pleadings, a hearing, legal briefs and argument of counsel for both parties, the court make the following findings of fact and conclusion of law.

FINDINGS OF FACT

Plaintiff, as administratrix of her late husband's estate, brought this action to enjoin the foreclosure upon some land in Walton County by Defendant. H.W. Smith, deceased (hereinafter Smith), and E.L. Whitfield (hereinafter Whitfield) formed a Tennessee Corporation known as Bubba's of Tennessee, Inc. (hereinafter Bubba's). Smith and Whitfield, as Treasurer and President respectively of Bubba's contracted with the Defendant J.L. Lester & Son, Inc. (hereinafter Lester) for the purchase of foodstuffs and other grocery items to be used by Bubba's in stocking three grocery stores located in Tennessee operating under the name of Food Giant.

Three promissory notes, one for each store, were executed by Smith and Whitfield both individually and as corporate officers of Bubba's for the inventory advances made by Lester. As security for the repayment of said notes a Deed to Secure Debt with Power of Sale, dated June 1, 1979, was

purportedly executed by Smith and delivered to Defendant involving approximately 397.34 acres of land in Walton County, Georgia. It is alleged by Defendant that this Deed also secured certain additional indebtedness incurred by Bubba's on an open account basis. The three promissory notes have been satisfied by payment in their principal amount plus interest. However, Defendant began foreclosure proceedings on the Walton County land because of non-payment of the open account indebtedness.

Prior to the initiation of foreclosure proceedings, Smith died intestate. On the date of his death, July 25, 1979, there existed no outstanding open account indebtedness and all such indebtedness was incurred both subsequent to his death and after Lester had notice of Smith's death. Smith and Whitfield in their corporate capacties had entered into a supply contract with Lester for each respective store. Part II-2 of each contract provides that the persons signing the contract shall be personally and individually liable for all indebtedness to Lester irrespective of whether the stores are being operated as a partnership, corporation or proprietorship. Such personal liablity is defined by the contracts to be primary, original, joint and several.

The contracts were drawn by Lester. Neither Smith nor Whitfield signed the contracts in their individual capacities.

Defendant alleges that catch-all language in the Deed to Secure Debt operates to secure future indebtedness as well as the three promissory notes. Thus, Defendant seeks to foreclosure on the Walton County land because of the open account indebtedness incurred under the contracts subsequent to Smith's death. Bubba's is involved in bankruptcy proceedings in the state of Tennessee.

CONCLUSIONS OF LAW

Smith signed all three contracts in his corporate capacity, not as an individual. Part II-2 of each contract did not change the capacity in which he signed. At most, Part II-2 operated so as to make Smith a guarantor of payment under the contracts for goods received. The death of a guarantor (Smith) with notice to the guarantee (Lester) revokes the guaranty as to future transactions unless the guaranty itself expresses a contrary intention. Sulter v. Citizens Bank & Trust Co., 51 Ga. App. 798 (1935). There is no evidence of a contrary intention in the instant case. Thus, Smith cannot be held personally liable for any indebtedness

incurred subsequent to his death. All advances made by Lester after Smith's death could be based only on the general credit of Bubba's and the guaranty of Whitfield.

Substantial fact questions remain on the issues of attorney's fees, the validity of the Deed to Secure Debt and the adequacy of Plaintiff's verification. These and all other issues must be resolved at trial. Therefore, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment be denied and that a temporary injunction is hereby issued enjoining the Defendant from exercising any rights of foreclosure under and pursuant to that certain Deed to Secure Debt attached to the Complaint as Exhibit "D".

This the 13th day of October, 1980.

/s/ Arthur W. Fudger
ARTHUR W. FUDGER, JUDGE
POLK SUPERIOR COURT

Opinion of Supreme Court of Georgia
Reported in 247 Georgia Reports p. 247

37116. J.L. LESTER & SON, INC. v. SMITH
Hill, Presiding Justice.

In June, 1979, J.L. Lester & Son, Inc., a wholesaler grocer, was selling merchandise to H.W. Smith, a retail grocer doing business in Walton, DeKalb and Fulton counties.

Smith and Whitfield purchased three supermarkets in Tennessee and entered into "Operating Statements" with Lester & Son as wholesaler as to each one. Among other provisions these uniform "Operating Statements", prepared by the wholesaler, provided that each store, a corporation, would, to the best of its ability, purchase from wholesaler at prices to be determined from time to time by wholesaler. The "statements" also provided in Part II, par. 2, that: "The persons signing this agreement for retailer shall be personally and individually bound to pay and liable for all indebtedness that may result on the part of retailer to wholesaler whether retailer is a partnership, corporation or proprietorship in addition to the liability of the retailer who may be operating as a corporation or part-

nership. The liability of the undersigned signatories shall be primary, original, joint and several, and suit may be brought for collection of such indebtedness against any one or more of the parties liable." At another point the "statements" provided that they were binding on "the representatives, successors and assigns of each of the parties hereto..." and shall continue for one year from date and be renewed thereafter automatically from year to year, provided that either party could terminate at any time upon written notice to the other party. The three "operating statements" were signed in substantially the following form:

"RETAILER:_____
( ) An Individual ( ) A Partnership
(x)A Corporation
By: /s/ Ernest L. Whitfield, Jr.
TITLE - President
By: /s/ H.W. Smith
TITLE - Secretary and/or Treas."

The name of the "Retailer" was not filled in on the signature pages.

Whitfield and Smith also executed three 90-day promissory notes for the beginning inventory, bills of sale to secure

debt, and financing statements. In addition, Smith executed a deed to secure debt with power of sale on 397 acres in Walton County to secure payment on the three promissory notes, the indebtedness of Smith and Whitfield, and the indebtedness of Bubba's of Tenn., Inc., a corporation being formed to own the three Tennessee stores.

Smith was shot at one of his DeKalb County stores in July, 1979; he left no will. Messrs. J.L. Lester and Ernest Whitfield attended the funeral. In the presence of Mrs. Smith, the deceased's widow, Whitfield told Lester that he would continue to operate the Tennessee stores.

After Bubba's of Tenn. filed for bankruptcy, the wolesaler commenced foreclosure under its security deed to the 397 acres in Walton County. Mrs. Smith as administratrix of her husband's estate, sought a temporary injunction against foreclosure, which was granted. The trial court found that the three promissory notes had been satisfied by payment of principal and interest, that in foreclosing under the security deed the wholesaler was seeking satisfaction of open account indebtedness, but that on the date of

Smith's death there was no open account indebtedness and all such indebtedness had been incurred subsequent to Smith's death and notice thereof to Lester.

The wholesaler appeals the grant of the temporary injunction, contending that Smith is a signatory and party to, and therefore personally liable under, the "operating statements" by virtue of the manner in which those "statements" were signed, that Smith also is primarily, personally and individually liable for the open account indebtedness by virtue of that portion of Part II, par. 2, quoted above, that Smith was a surety as to the open account indebtedness by virtue of that paragraph, and that the "operating statements" are binding on Smith's "representatives, successors and assigns" by virtue of their express terms. (The three"operating statements" will hereafter be referred to as one for convenience.)

Assuming that Smith was personally liable as a signatory and party to the "operating statement" by virtue of the manner in which it was executed, or that in any event he was personally liable for indebtedness incurred under the "state-

ment" pursuant to Part II, par. 2, we never the less agree with the trial court that neither Smith nor his estate was liable for the open account indebtedness which was incurred after his death with notice thereof to the wholesaler.

"If parties agree that one will buy and the other sell articles of a certain character at stated prices, without specifying any number or amount of such articles, leaving the purchaser to give orders, the giving of an order or orders for certain things included in the offer to sell, before its withdrawal or termination, makes a contract as to the things so ordered...." Buick Motor Co. v. Thompson, 138 Ga. 282 (2) (75 SE 354) (1912). The "operating statement" fixed the terms and conditions upon which purchases were to be made by the retailer from the wholesaler. It was an offer for formation of a number of contracts from time to time. Buick Motor Co. vs. Thompson, supra; Rest. Contracts, § 30; Rest. Contracts, 2d Tent. Draft, § 30, Comment c; 1 Williston, Contracts, § 58 (3d Ed. 1957). Smith cannot be liable for those contracts made after his death pursuant to the standing

offer made in the "operating statements" because "To constitute a valid contract, there must be parties able to contract (and) the assent of the parties to the terms of the contract...." Code Ann. § 20-107. Whether Smith be the offeror or offeree, "An offeree's power of acceptance is terminated when the offeree or offeror dies..." Rest., Contracts, 2d Tent. Draft, § 48. Not being personally liable as a signatory and party to the "operating statement" as to contracts made after his death, Smith was not liable under Part II, par. 2, thereof for payment of those contracts.

Thus, while it appears that Smith's estate would have been liable for payment upon any contracts entered into prior to his death, his estate is not liable for payment upon contracts made pursuant to the "operating statements" after his death. Therefore, the trial court did not err in enjoining the foreclosure sale instituted to satisfy the open account indebtedness incurred subsequent to Smith's death.

Judgment affirmed. All the Justices concur.

Decided June 2, 1981--
Rehearing denied June 23, 1981.

Injunction. Polk Superior Court. Before Judge Fudger.

Marson G. Dunaway, Jr., for appellant.

A. L. Mullins, Jr., for appellee.

ON MOTION FOR REHEARING.

The trial court found as facts that "The three promissory notes have been satisfied by payment in their principal amount plus interest" and that "On the date of his (Smith's) death, July 25, 1979, there existed no outstanding open account indebtedness and all such indebtedness was incurred both subsequent to his death and after Lester had notice of Smith's death."

On motion for rehearing, the wholesaler contends that this latter finding of the trial court was erroneous. This issue is one which can only be resolved at a trial on the merits and the trial court did not abuse its discretion in granting the interlocutory injunction in order to preserve the status quo until that issue could be decided upon the final trial of the case. Parker v. American Family Recreation Center, 229 Ga. 633, 635 (193

SE2d 830) (1972); Turner v. Trust Co. of Ga., 214 Ga. 339, 348 (105 SE 2d 22) (1958).

Motion for rehearing denied.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

J. L. LESTER & SON, INC.,
Petitioner,

v.

CAROLYN TEESE SMITH, ADMINISTRATRIX OF THE ESTATE OF H. W. SMITH, DECEASED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA AND SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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CASE NO. 82-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

J. L. LESTER & SON, INC.,
Petitioner,

v.

CAROLYN TEESE SMITH, ADMINISTRATRIX OF THE ESTATE OF H. W. SMITH, DECEASED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA AND SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

STATEMENT OF CASE

Although Respondent is in substantial disagreement with Petitioner's recitation of the facts of this case, she reserves the right to respecify such facts should this Court grant a writ of certiorari. For reasons hereinafter set forth, however, the writ should not be granted.

SUMMARY OF ARGUMENT

Petitioner has not set forth sufficient grounds upon which this Court should act in issuing a writ of certiorari to the Georgia Supreme Court and Court of Appeals inasmuch as Petitioner in the Georgia trial and appellate

courts failed to present in a proper and timely fashion those issues under the U. S. Constitution that it is now urging before this Court in seeking a review by writ of certiorari.

ARGUMENT

A quick review of the record in this case will reflect that Petitioner received an extensive and lengthy review of its case by the Georgia trial court, Court of Appeals and Supreme Court. During the course of the presentation of the issues to the trial court, Petitioner failed to raise any federal questions. Furthermore, Petitioner failed to raise federal questions in its Enumerations of Error before the Georgia Supreme Court, in the first instance, nor did it subsequently do so in its Enumerations of Error before the Georgia Court of Appeals. Passing reference was made to the federal questions, as conceded by Petitioner on pages 15 and 16 of its Petition, only in the Motion for Rehearing before the Georgia Supreme Court and in the Petition for Certiorari to the Georgia Supreme Court from the most recent Court of Appeals decision. Respondent would respectfully suggest that in both instances, the federal questions were alleged at the last minute inasmuch as Petitioner had failed on the merits and was grasping at straws in its final appeal before the Georgia appellate courts.

CONCLUSION

Petitioner has not raised before the Georgia trial or appellate courts in any meaningful way the federal questions which it now asks this Court to determine. Respondent would show that a review of this matter on writ of certiorari should not be entertained since, among other things, it does not meet the criteria set forth in Rule 17

inasmuch as the Georgia courts were never given the opportunity by Petitioner in any meaningful way to consider the federal constitutional questions herein raised. Specifically, with regard to Rule 17(b), the Georgia appellate courts did not decide ". . . a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals" nor, with respect to Rule 17(c), did the Georgia appellate courts decide ". . . an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court".

In summary, Petitioner never timely or meaningfully raised any of the federal questions before the Georgia courts about which it now complains.

Respectfully submitted,

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